
TYAS' LEGAL HANDBOOKS
LEGACIES.
2/-

(TYAS' LEGAL HAND-BOOKS.)

The Hand-Book

OF THE

LAW OF LEGACIES;

CONTAINING

A STATEMENT OF THE NATURE OF LEGACIES,

AND THE

ACCIDENTS TO WHICH THEY ARE SUBJECT;

TOGETHER WITH

THE RIGHTS OF LEGATEES,

AND

THE CAUSES AND MANNER OF THE ADEMPTION, CUMULATION, AND ABATEMENT OF THEIR BEQUESTS.

"Jam progressu futura."

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PREFACE.

THE utility of a little work of this kind is so obvious, that it needs no other setting forth than that given in the introductory observations with which it opens. It professes only to be a cautious guide, to make men acquainted with their rights, and not a professional assistant to obtain them; for it has ever been the author's opinion, that there would be less litigation and distrust if there were more knowledge, and more probity if there were more intelligence. A difference rightly explained is half settled, and a mind enlightened is a mind directed as well as sustained; and if the few following

pages should mak any of the community better informed as to their claims and position, with respect to their deceased relatives, he feels that he will have saved them, and those with whom they have to do, not a little trouble, and perhaps unpleasantry; and that he has contributed to the good-will as well as the information of his readers.

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THE

LAW OF LEGACIES.

CHAPTER I.

INTRODUCTION. — LEGACIES AND LEGATEES.

When it is known that the gross sum upon which the several rates of legacy-duty are paid in this country amounts to more than £40,000,000 per annum, and that, during the last thirty years, more than £1,000,000,000 of money have been consigned from the hands of those who held it to those of their friends and successors, some notion will be obtained of the immense number of individuals who are intimately concerned in the subject of this little treatise. The solemn fact by which the laws respecting legacies are brought into operation, is of all things most calculated to dim the perception, and to blind the judgment. Nor is the heart less ready to mislead at such

times than the intellect to fail; for in the distress arising from the loss of some dear friend or near relative, we are apt,—at least those are who are not callously selfish or morally debased —to think more of the bereavement we have sustained than of the interests and duties which the circumstance has called into action. Consciously unable to exercise our usual acuteness on such occasions, we submit to the guidance of some agent who has either been appointed by the deceased, or approved of by ourselves, for the distribution of his property; and we blindly rely upon his judgment and principles, when, perhaps, the one is not always sound, nor the other immaculate. The use of the faculties, with their usual business shrewdness, which duty and interest alike requires us to exhibit, too often looks like a cold-hearted forgetfulness of the kindness we have experienced, and the affection which we have enjoyed in the sense of newly acquired property, an advantage, which, to the man of right feeling, is, at that time of all others, the least desirable or valued. Or it may be that excessive grief so blunts the powers, that they are indeed incompetent to their usual task; and those whose interest it is our bounden duty to protect, even if we disre-

garded our own, may be injured through an incapacity to recollect what we know, or to make that useful which we recollect. In supplying the omissions of memory, or the want of right knowledge, we hope this little book will prove a useful as well as a sound and opportune guide.

LEGACIES AND LEGATEES.

A legacy is the gift of something by the written will of one who is deceased, conveyed through the instrumentality of the individual appointed by the testator to distribute his property after death.

To reception of property by this means the law of the land offers some exceptions. Among these are traitors, who, through their crime, have lost every civil right; and by a statute of Charles I., and another of George I., persons omitting to take the oaths required, and otherwise qualify themselves for offices, are placed under the same disability. Those who deny the Trinity, or assert a plurality of Gods, or deny the truth of the Christian religion, or the Divine authority of the Scriptures, are by the 9 and 10 William III., c. 32, made incapable of receiving a legacy. Artizans, also, who go out of the realm to teach or follow their

trades abroad, and who shall not return within six months after due notice given to them, are by the 5 Geo. III., c. 27, made subject to the same disqualification; and by the 25 Geo. II., c. 6, all legacies given by will or codicil to those who witness such will or codicil, are declared void; and the sentence is confirmed by the 1 Vic., c. 26, s. 15, whether the legacy be of real or personal estate. Legacies to priests and chapels to perform masses for the repose of the souls of the deceased, are void, as being appropriated to superstitious uses, and therefore forbidden as well by Edward VI., c. 14, as, from being against the constitutional intention of the law; but the professors of the Roman Catholic religion having by the 2 and 3 William IV., being placed on the same footing as other dissenters, in respect to their schools, places for religious worship, education, and charitable purposes, legacies to Roman Catholic schools, and for the object of promoting the Roman Catholic religion, are held heritable.

The legacy of a husband to his wife is valid; although, in consequence of the law considering them as one person during life, he cannot make any covenant with her. Yet the existence of such a relation does not abrogate his power to endow

her by bequest, because the bequest cannot take place till after his death, by which circumstance the relationship is determined. Care, however, must be taken to express the individual properly, and by name; as the intimation that a legacy of a husband to his wife, without mentioning her name, will only apply to the wife he has at the time of making the will; and in the event of her death, and his subsequent marriage with another person, that wife will not enjoy the advantage of the intention, but the legacy will lapse.

An infant, if alive, though yet unborn, may be a legatee; for it was decided in the case of *Defflis* v. *Goldschmidt,* that a bequest of £2000 to each of the children of the testator's sister, which were either then born, or should thereafter be born, included all the children born after his death; and an inquiry was directed as to the proper sum to be set apart for the legacies of children not at the time in existence. It was also further decided in the case of *Trower* v. *Butts,* that a bequest to the children of the nephew of the testatrix, which should be born during her life time, should include the child of which the wife of the nephew was pregnant at time of her death, although the child was not absolutely born until some months afterwards.

A mistake in the christian name of a legatee will not invalidate a bequest, when the individual who is intended can be ascertained; as where an individual left a legacy to the son of another, although he gave a wrong name, yet no doubt of the identity of the party intended existed. In another instance, also, where a certain amount was left to "each of the three children" of an individual, and it turned out that there were four children instead of three, the court allowed the fourth to come in also as a legatee of equal amount with the other three, under the impression that the word *three* was written in mistake, instead of *four*. The bequest of an unmarried man to "his children," took effect, with respect to his illegitimate children, as the children had by common repute been considered as his offspring. Such, however, would not have been the case had any doubt as to the parties existed; for in the case, *Earl* v. *Wilson*, it was determined that the words "to such child or children, if more than one, as A. may happen to be *enciente* of by me," would not apply to a natural child, of which she was at that time pregnant. There is, however, but little doubt, that had the testator acknowledged the child which she then carried, to be his before

witnesses, it would have enjoyed the bequest. Where children are stated, legitimate, children are supposed to be intended; unless it is impossible, through the celibacy of the testator, that he could have any legitimate children. But in the case of a female, where she had children of both kinds, and the bequest was stated to be to the children of R. M., deceased, and she left two, one legitimate, and the other otherwise, but reputed and allowed to be her child, and known to be so by the testator, the illegitimate child took its legacy with the other.

Great-grandchildren may inherit as grandchildren, unless a decidedly contrary intention appear in the will; and in several cases it has been decided, that the term *relations*, or *family*, in a will, means next of kin. A pecuniary legacy to the heir of a testator is construed to imply the heir-at-law, and not the next of kin, unless the sense of the passage in the will was influenced by the context to mean something else. The words, *personal representatives*, mean executors and administrators, unless some accompanying expression point out a different tendency. *Next of kin* was decided to be construed in its legal import for some time, but the decision was overruled, and now it means *nearest of kin;* and a

bequest by a party in India, "to his nearest surviving relations in his native country of Ireland," was held to apply to brothers and sisters living in Ireland or elsewhere. The bequest of a year's wages to each of the testator's servants, over and above what was due to them at his decease, was construed, in *Booth* v. *Dean*, to apply only to those servants who were hired by the year, and not to all the servants who might be generally employed about his establishment.

With the exception of those constitutionally and legally distinguished as above, and of those whose rights are invalidated by any moral stain, or obscurity in the language of the testator, all persons who can prove their identity with the party specified in a testators's will, may be legatees.

CHAPTER II.

THE ASSETS.

As it is of very little use for a man to find himself legatee of an estate, out of which there is nothing to pay his bequest, so also is it an equal evil if notwithstanding the existence of property to constitute an estate the assets, or the produce of that property be either uncollected or wasted, so that the legatees derive no benefit from them. One of the first things, therefore to be considered, is, whether there be any assets; and next, whether the executor has collected them for distribution. From the various nature of property arising out of the complex state of society, and the different periods and the different circumstances at which, and out of which that state of society and its customs arose, the legislators of the country in their care to secure the safe possession and the right appropriation of property, have endowed it with peculiar privileges, and made it subject to certain contingences according to its kind. Hence it is that the heir-at-law takes the whole of a property in fee tail, or entailed freehold, as it is called in popular language, to the exclusion

of every one else; hence it is on the other hand, that by the custom of *gavel kind* which prevails in the county of Kent, all the children of a proprietor are considered as heirs-at-law and inherit in equal proportions; hence it is that copyholds are subject to different rules to freeholds; and hence it is, also, that the several portions of a man's property, after his death, are often liable to different contingencies, and have obtained the different denominations of assets. These have been usually distinguished by the several terms of *real, personal, legal, and equitable* assets. They may be more broadly divided into assets, derived from real property, and those arising from personalty; the real and equitable being chiefly dependant on the former, and the legal, and personal from the latter of these two species of property.

REAL ASSETS.

Though real assets more often partake of an equitable character, that is, are subject to distribution according to the custom of a court of equity, yet, there are also real assets which are of a legal nature or subject to the rules of the common law. Until within a few years, real estate could not be touched for the satisfaction of debts

of common specialty or simple contract; but that system is now obviated, and funds which have descended to the heir in *fee simple*, that is unentailed freeholds, and even an advowson so descended, may be appropriated to the benefit of specialty creditors. An estate *pur autre vie*, or an estate held upon the life of another, when there is no special occupant, goes, according to the statute of frauds, and if does not it descend to the heir through occupancy, will fall to the executor and be assets in his hands for the satisfaction of claims, and by the 14 Geo. II., c. 20 will be appropriated like any other chattel interest. An estate *pur autre vie* in incorporeal hereditaments—as a rent, for instance, granted by one person to another, during the life of a third party, and the grantor of which dies during the life-time of the person who holds the property—goes to the executor.

"A., tenant for three lives to him and his heirs, assigned over his whole estate in the premises by lease and release to B., and his heirs, reserving rent to A., his executors, administrators, and assigns, with a proviso that on non-payment, A., and his heirs might re-enter, and B. covenanted to pay the rent to A., his executors and administrators; the rent was held payable to A.'s

executors and not to his heir, on the ground that there was no reversion to the assignor, and the rent was expressly reserved to the executor." So that in the case of the heir having entered, he would have been only trustee for the executor.

If a testator be a lessee, his executor will take the fish, rabbits, deer, and pigeons, as accessory chattels partaking of the nature of their principals, the land, the warren, the park, and the dove house. If an executor succeeds to a lease of land for years, the assets are comprised in the clear profits; but a reversion of a term forms assets, according to its utmost value. And if he renew the lease, that will form assets as well as the old lease. Should an executor be possessed of a term in right of his office, and he purchase the reversion of the freehold, he is accountable for the assets of the term, although it be extinguished; and so also if the executor of the lessee, surrender the lease, it shall be considered as assets, notwithstanding the term is extinguished. A person held a term in right of his wife as executrix, and he purchased the reversion; the term was extinct so far as she was concerned, but it was considered with respect to a stranger, that is, any other person, as assets in her

hands. But where an individual, on the marriage of his son, settled a lease for years, on him for life, and on his wife, and then on the issue of the marriage; and the son covenanted to renew the lease, and to assign it on the same trust; and he renewed the lease in his own name, but made no assignment to the trustees and died; the lease was held to be bound by the agreement on the marriage, and that it was not assets, nor liable to his debts, nor of course to his legacies. Neither is a lease for years granted on condition of being void on non payment of rent, which occurs, and the lessee afterwards dies. As little so is a term in the hands of the executor of a *cestui que trust.*

A term for years held by a testator, cannot be relinquished by his executor, when he has assets, unless he relinquishes the office altogether; but he is bound to continue tenant as long as the term continues, or as long as his funds hold out, if they will not continue the whole term.

A leasehold in Ireland is considered as personalty in the property of an English testator dying in England. A lease granted to A. and his executors, and accordingly to the executors after the death of A., becomes assets. If a

lessor also, covenant to renew a lease at request of the lessee, who, however, dies within the term without making the request, but it is made by his executors, the lessor is bound to renew for the legal rights of the deceased survivor to his representatives, whom the law presumes to be another self, and therefore implied although not named.

The grant of the next presentation to an advowson during the life of the grantee does not convey the presentation to his executors if he die before the church becomes vacant, for it is equal to a lapsed legacy.

If rent be reserved on a lease for years, and the rent be in arrear at the time of the lessor's death, it is assets in the hands of the executor. Trees felled during his life on land held by a lessee, without impeachment of waste, are assets to his executor after his death; but unless they are severed during the term, they belong to the lessor as owner of the freehold.

The executor does not come into any corporeal hereditaments, as leases for years of houses or lands, until he is in actual possession, and they cannot therefore until then be esteemed as assets: the dispossession of incorporeal hereditaments, such as leases of tithes,

is constructive, and ensues immediately on taking office; for it is evident that in these there can be no personal entry, and as soon therefore as tithes are set out, however remote the goods may be, he is in legal possession of them; but if the lease be of a rectory, where there are glebe lands as well as tithes, it would seem that he is not in possession of the tithes till he enter upon the lands, which being a corporeal hereditament, gives an opportunity of actual entry.

PERSONAL ASSETS.

Personal assets are either moveables not attached to the land or their produce, and derive their appellation from being either attached to the person of the owner, or from being capable of being moved about with him. They are either animate as living creatures, or inanimate, as vegetables, and include all the vast variety of property which necessity or luxury has called into existence. Properly speaking they are not assets until converted into money for the payment of debts or legacies, though they may certainly constitute the subject of specific legacies. As however they either form subjects of bequest, as they are, or the means by which it

is to be produced, we will follow the arrangement into which they naturally fall.

Animate *chattels,* as before they are converted into assets they are properly called, are divided into *domitæ* and *feræ naturæ,* or such as are tame or reclaimed, and such as are wild; the former admitting of an absolute, the latter of only a qualified ownership — the former embracing all kinds of farming stock and poultry, the latter all those which, unsubdued to confinement, still enjoy their natural liberty, and therefore cannot pass to representatives. Such also are fish in any natural stream or reservoir of water; but fish in a tank, as well as creatures in confinement, are capable of sale, and therefore of transfer: and this is the case also with all the young, the weak, or the lame, of all those wild creatures which, either from feebleness or any other cause, cannot assume their natural liberty. Under this specification come also all hounds, greyhounds, and spaniels, and all the accessaries of falconry or the chase, as well as every thing kept either for curiosity or from whim. An executor is also entitled to appropriate as assets deer in a park, hares or rabbits in an enclosed warren, doves in a dovecot, pheasants or partridges in a mew, fish in a private pond, and

bees in a hive of the testator, where lessee for years of the premises to which they respectively belong, so long as they continue in a state of subjugation, and no longer; for as soon as they obtain their natural freedom, they pass into the class of *feræ naturæ*, and are beyond the reach of his domain.

Vegetable chattels which may be appropriated as assets are the fruit of a tree or plant when separated from the body of the thing that bears it; or the tree or plant itself when severed from the ground, as grass that is cut, and trees which are felled, or branches which are lopped. Of the same character also are all those vegetable productions which are produced by the exertion and skill of the owner or occupier, and which are technically called enblements; extending to roots planted or other artificial profit, and including corn, growing crops, hops, saffron, hemp, flax, clover, saintfoin, and, in short, every other yearly production in which art and industry combine with nature. The executor has also been held entitled to hops though growing on ancient roots, as cultivation was necessary to produce them. Manure, in a heap, also, before it is spread on the land, is personalty; but afterwards it becomes attached to the soil, and

is consequently indirectly the property of the owner of the soil.

The inanimate chattels, which constitute personalty, are furniture, merchandize, money, (including stock in the funds, shares in public companies, and property of similar kind) pictures, clothing and jewels, and, in fact, every thing that can be moved from place to place. The presentation to a living, if the living be occupied at the time of the testator's death, is, as has been stated, property of a real nature, and of course goes to the heir; but if it be open or unoccupied, it forms a personal chattel, and becomes assets in the hands of the executor. Copyrights and patents are also considered as personal chattels.

All these things become assets in the hands of the executor, in whatever part of the world they may be, at the moment of the testator's death. But in order to their becoming so, it is necessary that the testator must have professed an absolute property in them; and therefore it is, that if he, having been the obligee of a bond, has assigned that bond with a covenant not to revoke, it does not become part of his assets. Nor are goods bailed, as it is called, or delivered for a particular purpose to a carrier, or to an

innkeeper, to secure in his inn; nor goods pledged, until the time of redemption shall have passed. Neither are the goods of an outlaw assets at the time of his death, for his executor has no right to touch them.

Chattels, however, whether real or personal, may be held in joint tenancy as well as in common; so if a lease be granted, or a house be given to more than one person absolutely, they are joint tenants of it, and unless the jointure be severed, it shall be the exclusive property of the survivor. But if the jointure of interest be severed by one of the parties disposing of his share to another, that other person becomes, with the previous owner or owners, a *tenant in common,* instead of a *joint tenant;* and the principal of survivorship does not hold, but the chattel, or the portion of it which belonged to the testator, whatever it may be, falls to the executor, and becomes assets. Thus, money left to two parties to be divided between them, occasions a tenancy in common, because it can be divided without injury to either; but not so with a horse or a house, for that could not be severed without destruction to it, and a consequent defeat of the testator's will. But on the argument of convenience and justice, and for

sake of encouraging husbandry and commerce, the goods of a warehouse or a shop, or the stock of a farm, although occupied jointly, will, in the absence of any express contract to the contrary, be considered as property in common; and on the death of any part owner of such property, his share would fall to his executors, to meet the claims of legatees, according to the will. So also, on that principle of personalty which the law invariably recognises, and that distinction which it invariably observes between the rights and actions of individuals, and the attachment and nature of property, the executor of a testator who has been joined in any action for the recovery of property, cannot take his place in the action and carry it on, however indolent or negligent the survivor in the action may be in endeavouring to bring it to a fortunate conclusion; but he has a right of action against him for the injury sustained by the property through his negligence, and also to oblige him to account when the action has terminated. In such a matter a court of equity will in general interfere.

Occasionally it happens that chattels real are changed into chattels personal, and thus become available for the payment of legacies; and chat-

tels personal are sometimes changed into chattels real; and thus the legatees are deprived of the amount for the liquidation of their claims. The former instance occurs when a debt has become due to an executor by statute, recognisance, or judgment, and he has in consequence taken the *lands* of the debtor in execution; for here the original property in the debt, which was money, and consequently personalty has been converted into realty, to which the heirs claim supersedes that of the legatees. Chattels real, on the other hand, are converted into personalty by the redemption of a mortgaged estate. Had the mortgage which the testator held become foreclosed through the negligence or inability of the mortgagor, the property would have continued *real* as it was at the time of his death, but by the payment of the debt, the estate again becomes money, and consequently a personal asset to meet the legacies, or any other claims upon the testator's estate.

LEGAL ASSETS OF CHOSES IN ACTION.

It is neither an improbable nor unfrequent occurrence, that, at the time of a testator's death, much of his property is outstanding, which, if got in, would satisfy all the claims of

the legatees, while, if it were neglected, they would lose half their bequests; and it is therefore necessary to consider the executor's interest in what are called *choses in action*, as well those where the right of action accrued during the life time of the testator, as after his death.

Firstly, then, the executor is entitled to every debt that was due to the testator, whether they be debts due on judgment, statute, record, recoguizance, or bond, or on special or simple contracts, rents, or covenants, under seal or promise, all of which constitute assets for the purposes of the will. He is also entitled, by the 4 Ed. III., c. 7, to damages for trespass committed during the testator's life time, or for the conversion of the same, or for trespass with cattle in his close, or for cutting and carrying away his growing corn, or for a debt incurred by the not setting out of tithes, to an action of prevention against the disturbance of his patronage; as, when a living has been void at the death of the testator, and another has presumed to appropriate this chattel, then become personal, to his own use, by presenting to the living, or to an action of ejectment against him whom he has presented. An executor is also entitled to damages for breach

of a covenant to do a personal thing, provided the breach occurred in the testator's life time; and this, notwithstanding the covenant has reference to realty, as felling, stubbing up, lopping or topping timber trees; for the damages are of the nature of personalty, though that on account of which they were recovered is real. Equally, also, and on the same grounds, can he sue for the loss of interest occasioned by non-payments on deposit-money, for the expense of investigating a title, where the vendor omits to make out a good title within the stipulated time, and the vendee dies. The executor of an assignee may also recover on a bail bond. In fact, in all those rights which accrued to the vendee before his death, and the proceeds of which are all of a personal nature, does the executor equally enter; and he is bound to the legatees to recover, if possible, whenever policy or necessity dictate the attempt.

EQUITABLE ASSETS.

According to the usual legal phraseology, the difference between legal and equitable assets is this; "legal assets are such as constitute the fund for the payment of debts, according to their legal priority; whereas, equitable assets

are those which can be reached only by the aid of a court of equity, and are subject to distribution on equitable principles, according to which, as equity favours equality, they are to be divided *pari passu* among all the creditors." This is a very important distinction, and of great consideration in the payment of debts, and it has accordingly been fully set out in the Hand-Book for the instruction of Executors and Administrators. There the difference is as to the *distribution* of equitable assets, but here we have to regard their attainment. The difference between the different species of legacies will be shown hereafter, but in this place we may look upon them in one light, and consider that there is both sufficient to pay the debts and satisfy the legacies, if the assets are all got in, and properly distributed. With respect to the debts, the legal assets are applicable in a certain order, while the equitable assets are equally shared among the creditors. But with respect to the legacies, saving the instance first alluded to, of specific legacies which are to be noticed hereafter, the assets, whether legal or equitable, are all distributed equally, that is, in full, if sufficient to satisfy in full, or in proportionate equality, according to the amounts of the legacies,

and the means to pay them. Our business, therefore, here is to show what the executor is entitled to, and what he ought to obtain in order that the legatees may not suffer from his negligence.

The executor enters, then, fully into the equitable title of the testator, in respect of personal property, and this whether it accrues before or after his death. Thus, if an individual shall have contracted to deliver certain goods to the testator on a certain day, and the day does not arrive till after his death, and they are delivered to his executor, they will constitute assets in his hands, and should the individual who has covenanted to deliver them fail in his duty, the damages that shall be recovered in consequence will be equally available to the creditors or legatees. So, also, if any party has covenanted to grant a lease of certain land by a particular day, and the testator dies before the day, the executor is entitled to the lease, or to compensation in the way of damages in lieu of the lease. To such an extent, indeed, does this run, that in the case of *Husband* v. *Pollard*, where a father held a lease of the church, renewable every seven years, and he assigned it to his son in trust for himself for life, remainder

in trust for the son, himself, his executors, administrators, and assigns, and the father covenanted to renew the lease every seven years as long as he should live; and the son died; and the father failed to renew the lease within the seven years; and the executor of the son filed a bill to compel him to renew; it was decided that he ought to do so, and he was compelled accordingly; and this lease became assets in the hands of the executors at the father's death.

If a defendant in execution at the testator's suit escape after the testator's death, the executor shall recover damages for the escape, they will form assets; so also are goods replevied after the death of a testator. If a testator die possessed of a term for years in an advowson, the term rests in the executors, and, in the event of their being disturbed, any damages they may recover in consequence will be equally available, as also any other property recovered by a suit in equity. But when a cause of action accrued before the testator's death, neither cause nor damages are to be considered assets until the proceeds are, by execution or otherwise, reduced into possession. Neither is the balance of an account stated with the executor to be so considered until paid. If, however, they be recovered and released by

the executor, he will still be responsible for them, for the release is tantamount to an acknowledgment of receipt.

Should the cause of action accrue after the testator's death, both the action and the damages become assets immediately, unless the breach of engagement affect the realty, in which case they belong to the heir. At the death of a joint merchant, all his interest in his *choses in action*, or things coming, though not yet come, to hand, through legal or equitable suit, and whether, therefore, they be legal or equitable assets, devolve, according to the amount of the testator's interest in them, to the executor.

CONTINGENT AND DEPENDENT ASSETS.

Besides all these means by which property may be realised by an executor to pay the claims of the legatees, there are yet other more remote and uncertain sources from which he may in the course of time come into the possession of assets, which may enhance their interests. These consist in the peculiar conditions annexed to certain properties; properties again which may come to the testator's estate in consequence of his being entitled to them as remainder man or contingent devisee, as his outliving some other individual,

or happening to fulfil an engagement which that other has failed to perform. Or he may have been unconsciously entitled, as residuary legatee, to property, the surplusage of which has not been discovered, or recovered till after his death. Or property may have come to him through increase of some fund, or by assignment under some deed or covenant, or by limitation and selection.

An executor may become entitled to property in his official capacity by condition, as if the testator shall have granted a lease, or other chattel, to a certain person, on condition of his paying a sum of money, or doing some specific act, and it is discovered after the death of the testator that that person has failed in his part of the agreement, the chattels will then be assets in the hands of the executor. Or where the agreement is that the testator or his executors shall pay a certain sum, to avoid the grant, and the sum is paid. Or the testator may have pledged plate or a jewel, and the executor redeem it at the time and place appointed, before the day of redemption has passed. If he has redeemed with his own money, and, in consequence of the want of funds of the testator's property, the chattel is obliged to be sold to pay the executor's disburse-

ments, and if it sell to more than they amount to, then the surplus above that amount will be assets in his hands, for the benefit of the creditors and legatees, or both.

Chattels may also accrue to an executor by remainder or increase, which never came into the testator's personal possession, as if a lease be granted to a person for life, with remainder to his executors for a certain period, the remainder will be assets in their hands. Likewise where a lease is bequeathed by will to a person for life, and on his death to another, and that other dies before the first, although he never had any personal right in it, yet it will devolve to his executors, and be assets. So, also, a remainder in a term for years, though it never rested in the testator's possession, and, though it continue a remainder, shall go to the executor and be converted for what it will obtain. Such, also, is the case with the young of cattle or the wool of sheep, produced after the testator's death, as also the profits on lands devised over and above the rent, if he enter upon them, and the testator has been a lessee for years. Such, also, is the property in a trade in which the deceased has been a partner, and in the articles of partnership of which a covenant has been

made, that his survivors should take his share. Or a testator may direct his executors to carry on his trade, appointing either the whole or a portion of his assets for its conduct, and then the proceeds will form assets.

An executor may also come into the possession of assets as a representative assignee, for if the testator shall have died an assignee, his executor will take his place, and use the assets which he derives, belonging to the testator, for the purposes of his will. So if a legacy is bequeathed to a person and his assigns, and that person die before its receipt, his executors will be entitled to take it as his natural assignee. Such is the case also if a person be bound to abide by the award of two arbitrators, and they award that he shall pay to another person, or his assigns, a certain sum of money before a day mentioned for that purpose, and that other person die before the day, his executor or assignee is entitled to the money. This principle however does not hold where any specific assignee is appointed, for then that assignee, and not the executor of the party named, will take; but where no specific assignee is named, the executor becomes the assignee.

Limitation also often becomes a source whence

an excutor derives assets. Thus in the case of *Pinbury*, v. *Elkin*, where a testator directed that in case his wife should die without issue by him, his brother after her decease, should have eighty pounds; and, after testator's death, the brother died in the life time of the widow, and she afterwards died without leaving issue, it was held that the possibility devolved to the executors of the brother, although he died before the contingency happened, and the legacy went accordingly with interest from the widow's death. It was also held in the case of *Chamey* v. *Graydon*, that where legacies were bequeathed to children, to be transferred to them at their respective ages of twenty-one years, or days of marriage, and that any of them should die, or marry without consent, his or her share should go to others at their age of twenty-one years, Lord Chancellor Hardwick decreed that a share accruing by the forfeiture of a child's marrying without consent vested in another child who attained twenty-one, but died before such forfeiture, so as to entitle the personal representitives of such deceased child to an equal share with other deceased children.

Where a person who has a legacy bequeathed to him out of a personal estate, and which legacy

is to be paid when he is of the age of twenty-one years, and he dies before that time, his executors are entitled to the legacy at the moment of his death, if it is intended to carry interest, but if it is not to carry interest, then on the day on which he would have been twenty-one. But if the legacy is to be paid to the person to whom it is bequeathed at his age of twenty-one, or if he shall attain the age of twenty-one, and he die before that time the legacy will lapse. But if the interest is given before the time of payment, that is held to *vest* the legacy; and his executors would consequently be entitled to the amount as assets.

With respect to the interest arising out of land, however, the rules are totally different; for whatever the nature of the legacies to which the land is to be appropriated, whether for a child or a stranger, and with, or without interest, the charges on land, payable on a future day, are not to be raised where the party dies, before the day of payment, except where the time of payment is postponed on account of the fund and not of the person. In the case of *Watkins* v. *Cheek*, where a legacy was charged upon real estate, to vest immediately on the testator's death; and to be paid to the legatee on attaining twenty-one, the interest being applied in the mean

time for maintenance, and the legatee died before attaining that age; it was held that the express direction, that the legacy should vest on the death of the testator prevented its sinking; and the representative of the legatee was consequently entitled to the legacy. Where lands are devised for the payment of portions, and any of the children entitled die before the lands are sold, the representatives of that child will be entitled to the money. In the case where a legacy is charged both upon the real and personal estate, and the executor claims out of the latter, he will succeed according to the rule of the spiritual court, where the claim is determinable, though the infant legatee should die before the time of payment, but the legacy will sink as far as it is charged upon the land.

Election is also a means by which an executor may claim, as in the instance where a testator was entitled to take his choice out of several chattels, and he has failed to choose; but if nothing passes to the grantee before his election, it should be made in his life time. Should the election determine the manner or degree in which the thing shall be taken, the executor may take it as well as the grantee, for then there is an immediate interest; as, for instance,

if a lease be granted to a person for ten or twenty years, as he shall choose, the executor may elect.

We have thus at some little length endeavoured to make it as clear as possible what are the sources from whence the assets of a testator are to be derived. We will now proceed to see how they are to be disposed of when obtained, and ascertain what is technically called, the "Marshalling of the assets."

CHAPTER III.

MARSHALLING OF THE ASSETS.

It was enacted by the 47 Geo. III., c. 74, that the property of any trader who died possessed of, or entitled to, any real estate or interest in real property which would be assets for the payment of any debts due on specialty, in which the heir was bound, should be equally applicable through the administration of a court of equity, for *all* the just debts of such trader, whether debts due on simple contract, or otherwise; thus remedying one of the most unjust mischiefs which ever disgraced the jurisprudence of any country. For, before, a man would die possessed of immense landed estates, and owe immense sums as debts upon simple contract, one hundreth part of which, perhaps, would scarcely beliquidated before the day of doom, in consequence of his leaving but a small personal property to pay them, while his real property could not be touched for the purpose.

That statute, however, only applied to those persons who were traders at the time of their decease, and not to those who left off business

before they died; and it was repealed by 1 Will. IV., c. 47, but re-enacted by the same act, in order to remedy the frauds for which no previous provision had been made. By this act it was decreed, that "all wills and testamentary limitations, dispositions or appointments of real estates, whereof any person shall be seized in fee simple, in possession, reversion or remainder, or have power to dispose of by will, shall be deemed fraudulent and void as against creditors, by bond, covenant, or other specialty binding his heir," and right of action is given the creditors against the heir or devisee. A further improvement was made by the 3 and 4 Will. IV., c. 104, by which all landed estates of freehold, custom, or copyhold, are made liable for the payment of simple contract as well as specialty debts, as much as they had previously been for the debts in which the heir was bound; but still the creditors in specialty in which the heir is bound, are to be paid in full before the creditors by simple contract, or the other specialty creditors, are paid any part of their claims. By the 5 Geo. II., c. 7, all the real property in the British plantations in America, is made subject to debts as if it were only personal.

Lands may be devised to be sold for the

payment of debts only to which it will be alone restricted; or if there is sufficient to satisfy all claims, it may be sold for the payment of legacies only, and not debts, in which case no debts can be paid out of the funds it produces. But in the first place, the personal assets of the testator shall in every instance be applied in the discharge of his debts or general legacies, unless by manifest intention they are exempted, as a plain declaration, or an inference so necessary, as to be tantamount to a declaration. A devise of the real estate, therefore, subject to the payment of debts, will not exempt the personal estate, at least only in appearance; for if even the testator direct the real estate to be sold to pay the debts, the personal estate will, by the rule of law, be taken to exonerate the rule, unless the whole of the personal estate be left in specific legacies. It is indeed directed, by the decisions in several cases, to be thus applied, even though the personal debt should be secured by mortgage, and whether or not there be a bond or covenant for repayment. By the same rule, lands which have descended will exonerate lands which have been devised; and both unencumbered and mortgaged lands which are devised, though even specifically and expressly after the payment of

all debts, will be used to throw off the mortgage, for in every such instance the debt is considered as only a personal debt of the testator, and, consequently a merely collateral charge upon the real estate.

Where, however, the charge is chiefly on the real estate, and the charge on the personal is only collateral, a different rule prevails. As, for instance, where a real estate has been bought subject to a mortgage, for then the real estate which bears the burden, and not the collateral personal estate of the purchaser, shall be used to discharge the debt, unless it evidently appears that he intended that effect; but a mere covenant for making the debt secure would not absolve the real estate from its liability.

In the application of real assets, when the personal estate is exhausted or exempt, the order to be observed is, firstly, "the real estate expressly devised for the purpose shall be applied; secondly, to the extent of the specialty debts the real estate descended; thirdly, the real estate specifically devised, subject to a general charge of debts."

It is necessary also, in order to understand the right position of legatees, to state, that where a creditor has more than one fund to resort to for

the satisfaction of his claims and, another has only one, and he who has more than one chooses that fund on which he who has only one has a claim, that the creditor who has only one shall be able to come upon the other on which he had previously no lien; so that if a special creditor be satisfied out of the personal assets when they are only sufficient to satisfy the simple contract debts, the simple contract creditor shall have a claim against the real assets when the personal assets are exhausted. The same marshalling of assets may take place in favour of legatees, and against assets descended they have the same equity; as, for instance, when a simple contract creditor, who is prior in his claim to a general legatee, shall have been satisfied out of the personal assets, when they ought to have been left for the satisfaction of inferior claims, the general legatee shall stand in his place as to the real assets; so when the legacies are charged by the will on the real estate, and the legacies given in the codicil are not, the former shall resort to the real assets when there is an insufficiency of the personal assets to pay the whole. In the same manner, should a specialty creditor choose that his claim shall be satisfied from the assets in the hands of

the heir, the heir shall be entitled to a recompense out of the personal estate.

But the principles of these rules do not extend so far as to enable one claimant to overrule the rights of another, and a pecuniary legatee will not, consequently, stand in the place of a specialty creditor in his right against any lands specifically devised, though he will against those which have descended in an ordinary manner. Where, however, a mortgagee has exhausted the personal assets, instead of taking the estate over which he held his particular power, the legatee will come upon the mortgaged premises for the satisfaction of his claim, for the personal assets ought not to be so appropriated, to the defeating of any legacy, either specific or pecuniary. Where, also, a specialty creditor shall have exhausted the personalty, the legatee will have a claim upon the real estate before a residuary devisee. Yet in the case of *Handley* v. *Roberts*, where the testator had left three leasehold estates, one of which was mortgaged, and the residuary personalty, which was the fund he appropriated to the payment of the debt, was exhausted without fully satisfying the claim, the other two leaseholds were held exempt from any share of the burden, and the

legatee of the mortgaged estate took it with its weight as it was. None of these rules subject any portion of an estate to claims to which it was not liable before, but only go to the extent of securing the rights of every claimant with equal fairness.

Where a testator dies possessed of both copyhold and freehold property, and he charges all his *real* estate with the payment of his debts, both species of property will be equally subject to the impost, if he shall have surrendered the copyhold to the use of his will, but if not, the freehold must be exhausted before the copyhold can be applied.

If a legatee be entitled to a legacy at some future day, out of the mixed fund of real and personal estate, and he die before that day arrive, the legacy will become vested and transmissible if it be made payable out of the personalty, but will sink on the death of the legatee if it be charged on the real estate. The wife will stand in the place of specialty creditors, for her paraphernalia, against real assets descended, but whether or not against such as are devised is not yet finally determined, unless such real assets shall have been stated specifically, to assist the personalty in the liquidation of debts.

As respects bequests for charitable objects, a court of equity will not marshall the assets so as to give effect out of the personalty, notwithstanding that they are void as regards land. Under a devise of real and personal estate in trust to pay debts and legacies, some of which were void by statute as (charges for charitable objects upon real and leasehold estates), and there proving a deficiency of assets, the other legatees were preferred to the heir.

CHAPTER IV.

LEGACIES — GENERAL, SPECIFIC, LAPSED, VESTED, DEMONSTRATIVE.

LEGACIES are gifts of the property of a deceased person to his surviving friends or relatives, expressed in the deed or will by which his disposable property is governed after death. They are styled *general* when a certain amount of property is bequeathed to a particular person, without any certain fund being appropriated for its payment. They are *specific* when the particular things are named, as well as the particular persons to whom those things are bequeathed. Legacies *lapse,* or are lost to the party or his representatives, or friends, when some particular condition is annexed to the bequest, which condition has not, or cannot be, either through negligence or impossibility, complied with. They are, on the contrary, *vested,* or made the property *de jure* of the party to whom they are left, when, through his own act or without it, certain conditions, which were predicated by the terms of the will, have been fulfilled; although the legatee may not come into possession of his rights for years perhaps after the death of the tes-

tator. Farther, legacies are *demonstrative* when it is evident that, under a certain set of circumstances, certain persons are intended to inherit certain portions of property, and those certain circumstances arise by which the demonstrative legatees acquire their rights. These several terms will be clearer when they are farther explained and illustrated by examples, to which we will immediately proceed.

GENERAL LEGACIES.

General legacies are such as are specified in a mere statement of quantity; as, A leaves to B £500, to be paid out of his personal estate, without specifying any particular portion of property out of which the sum is to be paid. Nor does it matter whether it be of money or stock; and where the testator has not the stock stated in his will, but has the wherewithal to purchase it at his death, the executor is bound to procure so much stock for the legatee. But if the terms of the will be specific, as "so much stock, *standing in his name*," and he has no stock whatever, the legacy would share the fate of a specific legacy, and fail. The purpose, however, to which a general legacy is directed to be applied, will not alter its nature, however

specific the object may be. Personal annuities, given by will, are also general legacies.

Legacies may be specific in one sense and pecuniary in another—being specific when they are given out of a particular fund, and not out of the estate at large; and pecuniary, as consisting only of definite sums of money, and not amounting to the gift of the fund itself, or any portion of it.

In the case of the *Attorney General* v. *Parkin*, Lord Camden recognized the distinction between a legacy of a certain sum due from a particular person, and a legacy of such debt generally; considering the former as a legacy of quantity, while the latter he deemed to be specific.

SPECIFIC LEGACIES.

Specific legacies are of two kinds; the first of which includes such chattels as are so described as to identify them from all others of any other kind, or of the same kind, as, "I give the silver candlesticks, left me by my late uncle, to such a person." Here the meaning cannot be misunderstood, and the legatee can take the particular candlesticks in question, and none others; and, consequently, should it have happened that the candlesticks in question have either been lost

or parted with by the testator during his lifetime, or cannot be found after his death, the person to whom the bequest is made will lose his legacy. The second kind implies a particular chattel, as expressed in the will, but without distinguishing it from any other chattel of the same kind. Thus, the words, "I hereby give and bequeath a diamond ring to my nephew, J.," would give to J. a diamond ring, even though the testator had not one in his possession at the time of his death, and he would obtain his legacy in full, even though those of the general legatees should abate of half their value in consequence of claims against the property of their benefactor. The gift, however, of a sum of money for the purchase of a specific legacy becomes a general legacy, and therefore liable to abatement.

Generally speaking, there is an indisposition in the courts to construe the terms of a will into a bequest of a specific legacy, but if the expression clearly indicate an intention to separate any particular thing from the general property, they will always readily allow the specificness of the legacy; and, hence, under some circumstances, even pecuniary legacies become specific. Thus, in the case of *Lawson* v. *Stitch*, a legacy was stated as consisting of, or conveying a certain sum of money, in a bag or chest, and

the whole of that money became a specific legacy. Thus, also, in *Hinton* v. *Pinke,* a sum of money was left, which, at the death of the testator, was in the hands of a third party, and was stated in the will to be so, that money was esteemed a specific legacy. So, also, was a rent charge upon a lease; for it was evident that only one rent charge, or one lease, could be understood. In like manner, the bequest of a bond, and the amount of the testator's stock, in a particular fund, as well as a legacy out of the profits of a farm, which the testator directed to be carried on, as was decided in the case of *Mayott* v. *Mayott,* the principle being fully developed, in the action of *All Souls' College* against *Coddington.* Specific legacies may also be carved out of a specific chattel, as is partly shown in the case of *Hinton* v. *Pinke,* just cited; as, where the testator gives only *part* of a debt, instead of the whole, which is owing to him, at the time of his death, by a third party.

Yet, in order to insure the descent of a specific legacy, which is always *ceteris paribus,* more valuable than a general one, it is requisite that the testator should not nullify by any other expressions in his will the terms of a specific legacy; as was decided in the case of *Parrot* v. *Worsfield* where a testator, reciting that he

had £1500 in the 5 per cents., gave it to one party, and then gave all other stock that he might be possessed of at his death to another, and, in consequence of the manner in which it was put, the latter of these two legacies was made subject to his debts, in preference to the former, when, in fact, there is little doubt but that the testator intended that both should in that respect stand on an equal footing. Much of the same kind of mischief arose in the case of *Willox* v. *Rhodes*, where the testator gave a number of legacies, and added: — "I guarantee my estates at D. for the payment of the above legacies;" while, in an after part of his will, he gave many other legacies, it was held, that if the estates at D. should prove insufficient to satisfy the claims of the first class of legatees, the legacies were not specific, and the whole of the personal estate was proportionably liable for them. But, in the case of *Sayer* v. *Sayer*, where the testator devised the whole of his personal estate, at a particular place, to his wife, the bequest was held to be as specific as if he had enumerated every particular of the property there.

In some instances mistakes have arisen, in consequence of the misapprehension of particular

terms by the parties who use them; and not a little care is often required to come at the precise meaning of a bequest. Thus, in a general sense, the word *money* only implies either the coin of the realm, or the legal tender for it, bank notes; or else such equivalent as the state may have given in lieu of money, or that which is used to express the money lent to the state, and for the security of which, the faith of the state is pledged, or the public stocks; and, therefore, promissory notes, or bills of exchange, and other similar *choses in action* are not included in the meaning of the phrase, yet, in some instances, they will be construed as meaning such. This was shown in the case of *Read* v. *Stewart*, where the testatrix had bequeathed a cabinet, and all that it contained, "except money," and part of the contents was a promissory note of value, and of a date payable anterior to her will, and, of course, to her death, it was held that the terms of the bequest did not pass the note.

Yet a liberal construction is put upon the terms of a bequest, and an evident mistake will be rectified, as in the case of *Penticost* v. *Ley*, where the testatrix made a bequest of £1,000, long annuities, standing in her name,

or in trust for her, while, in fact, she had no long annuities whatever, but had really £1,000 in the 3 per cents. reduced, it was held, that this, and this only, could be the sum to which she alluded, and it was accordingly appropriated to the legatee. Still, it must be a mistake respecting which there can be no apprehension, or the legacy will fail; as in *Humphreys* v. *Humphreys,* where the testator was indebted on a mortgage, which he had paid off previously to his death, out of a fund of £5,000, which he had in the 3 per cents., neglecting to alter a provision in his will, by which he had left the whole of his stock in these 3 per cents. (which he specified as *being about* £5,000), except £500, which he left to another party, devising at the same time other specific parts of his property to be sold, and the produce to be applied in discharge of the mortgage; the circumstance of his having himself applied this fund to the discharge of the mortgage was held to have redeemed the legacy altogether, and the legatees could obtain no remedy against those other parts of the general estate which were directed to be applied to the redemption of this mortgage. This, however, was contrary to the general rule of equity, and it may be presumed

that it would have been set aside on review. Lord Bathurst, it is true, held the same principle, at least to a certain extent, in the case of *Carteret* v. *Carteret,* where the testator gave to one of his connections "one thousand four hundred pounds, for which he had sold his estate that day," — which sum he received, and paid into his bankers, but drew eleven hundred of it out the same day, leaving the other three hundred there still; his lordship decided it to be a legacy of quantity, and therefore general, and subject to the diminution occasioned by the draft of the testator; but Lord Thurlow disallowed the distinction set up by Lord Bathurst, and decided that a legacy of "the principal of A.'s bond for three thousand five hundred pounds," was a specific legacy, although the sum was named.

Thus, the principle appears to be evolved, that a legacy, in order to be specific, and saved from any general abatement suffered by other legacies, must be stated precisely as a certain thing or fund, or a particular portion of a certain thing or fund, so that it may be whole in itself, though possibly a part, but a plainly indicated part, of something particularly described in the will.

THE VESTING OF LEGACIES.

A legacy is said to *vest* when the party to whom it is bequeathed is not able to claim it at the seasonable time for the payment of general legacies, either through absence, or any other cause; or when it is directed by the testator that it shall be paid at some future period, and nothing occurs before the arrival of that period to prevent the legatee's right. Thus, a legacy left to be paid to a certain party a certain number of years after the death of the testator, without the annexation of any condition, such as, "if the legatee shall so long live," would vest the legacy; and if the legatee did not survive the period named, his heirs or representatives would come into his right; or should it be even said that the legacy is to be *payable* to the legatee at a certain age, it is still vested, though he should never attain that age. But if it be said in the will that the bequest is to be paid *when*, or *as soon as*, the legatee shall attain a certain age, and he dies before the age specified, the legacy does not vest, but goes to those who may be stated in the will as the parties to receive it, in the event of the first legatee failing to survive, or into the general distribution directed by

law. The distinction was originally instituted by the code of Justinian, and adopted by the English courts, not so much on account of its intrinsic equity, as from its prevalence in the spiritual courts, in order, that when the court of chancery acquired a concurrent jurisdiction with those courts in the adjudication of legacies, the claimant might obtain the same measure of justice from whatever court he might apply for redress.

This rule, however, respecting the vesting of legacies applies only to legacies of personal property transmissable to the legatee as *personalty;* for the contrary holds, if the legacy be either charged upon real estate, or upon personalty to be laid out in real estate, and it would then be included under the next head, and would lapse. The reason of this is, because in devises affecting lands the ecclesiastical courts have no concurrent jurisdiction, and the distinction created by the circumstances of the future, does not extend to them. Yet, should the legacy be of personalty, and it be expressly stated that it is to carry interest, it will vest, and be transmissible to the legatee, or his representatives, notwithstanding that the words of positive conveyance, "payable," or "to be paid," are

omitted, for the payment of interest is an adjudication of the principal.

THE LAPSING OF LEGACIES.

A legacy is said to *lapse,* or slip from, or be lost to the legatee, where, through his own fault, or through an impossibility over which he has no control, he fails to fulfil that condition of the will on which he is expressly to take the bequest. Thus, if a legacy be left to a person which is directed not to be paid unless he attains a certain age, and he dies before that age, though the death be no fault of his own, his representatives will be divested of all the right which they would otherwise have acquired.

One peculiar instance of this was shown in the facts elicited in the case of *Tulk* v. *Houlditch,* in which it appeared that the testator left a legacy to a person, concerning whom there was every probability that he was not alive, but yet no certainty could be obtained. In order, however, to insure the identity of the party, the bequest had a condition annexed to it, that the legatee should return to England, and personally claim of the executrix, or within the church porch of the parish, within seven years, otherwise the legacy was to lapse, and fall into the general residue.

It afterwards appeared that the legatee was really alive at the time the bequest was made to him, but he failed to return, and, in fact, died abroad within the seven years. Lord Eldon, accordingly, held that the legacy had lapsed, for though the legatee was living he had not fulfilled the directions of the will, and he thereby lost his right to the bequest.

The general rule respecting the lapsing of legacies is, that if a legatee die before the testator, the legacy shall become a portion of the general residuary estate, nor will a statement that the bequest is made to the legatee, his executors, administrators or assigns, or to him and his heirs, prevent the lapse; nor will even the expressed desire of the testator, that the bequest shall not fail if the legatee shall die before him, exclude the next of kin. But a slight alteration of the terms of the will may prevent the failure, as in the case of the death of A. before the testator, other persons are named to take; for instance, A.'s legal representatives, or the heir under his will, or to A., B., C., "or to their heirs," or to A., "and failing him by decease before me, to his heirs," the legacy, on A.'s so dying, shall vest in such nominees.

It is decreed by 1 Vict. c. 26, s. 29, "that in any devise or bequest of real or personal estate, the words 'die without born issue,' or 'have no issue,' or any other words which may import either a want or failure of issue of any person in his life-time, or at the time of his death, or an indefinite failure of issue, shall be construed to mean a want or failure of issue in the life-time, or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will."

We may conclude with the observation, that where a legacy is clearly left to any particular person, the court will require very clear evidences of the failure of the performance of conditions, before it will allow a lapse to the loss of the representatives of the legatee; and, that just in proportion to the clearness of the bequest, is the danger of the lapse.

DEMONSTRATIVE LEGACIES.

It sometimes, though rarely, occurs, that the party who is to inherit a bequest can only be ascertained by inference, instead of from the clear declaration of the will; and the legatees so

ascertained, are termed *demonstrative* legatees. Such are often found in distant, or unknown, or unrecognized relatives or friends of the deceased.

CHAPTER V.

ASSENT TO LEGACIES.

It is the peculiar attribute of the office of an executor, that he stands as the medium of communication between the dead and the living. Responsible in his conscience to the former for the fulfilment of his desires, responsible to the latter by the law for the satisfaction of their rights. In him the right of property vests previous to its distribution, and this during the exercise of his duty, almost as fully and effectively as if the goods he has to apportion were his own. The legatees under a will, whether their bequests be general or specific, acquire only an anticipatory benefit until the time arrives for the complete conveyance of their legacies, either according to the terms of the will or the rule of the law. Until then the deputy of the testator holds complete possession, and none can touch an iota of the chattels without his permission. Consequently, the

ASSENT OF THE EXECUTOR

to the payment of a legacy is necessary before a legatee can touch the property left to him; and

if any of those who are benefitted under a will take possession of his legacy without that assent, the executor may maintain an action of trespass against him.

This is highly requisite; for a misapprehension of his duty, or a negligence in the performance of it, might subject an executor to serious loss. For instance, according to the law of England, a man's property is, in the first instance, after his death, to be applied in the payment of his debts in their regular order—debts due to the crown, debts of record, judgments, bonded and simple contract debts—and if the effects prove insufficient, or if they are only barely sufficient, to satisfy these, the legatees are all excluded from any benefit under the will. And should he have paid any legacy before the satisfaction of any debt, and it afterwards turn out that the funds were not ample enough to pay both, he must either recover the amount paid to the legatee, or satisfy the debt out of his own private resources.

Should, however, the assets prove large enough to pay all the debts, but insufficient to satisfy all the legacies, the legatees, and the claims of all the general legatees, will abate in proportion; and if he either pay, or suffer any one else to

appropriate to themselves, a legacy in full, while the rest were obliged to take only a quarter of their bequests, they would have the right of compelling the executor to refund to them the several amounts which they had lost by the undue payment of one. As a protection, therefore, to the executor, his assent to a legacy is necessary — not that he can unjustly withhold that assent where the means are sufficient, or even proportionably sufficient — his assent to a legacy is necessary before that legacy will vest or be assured to the party to whom it is left. But this assent once given, is evidence that the assets are sufficient, and an admission on his part that the fund is competent to discharge the legacy; and should he afterwards refuse to pay it, on the ground that it was not so, the legatee may compel the payment out of his own private estate.

Without this assent, however, whatever may be inchoate rights of the legatee, he has no vested rights; and even in the instance of a specific legacy, though it be of a chattel real, as an estate, or of a chattel personal, as a horse or piece of furniture, in the care or custody of the legatee; and though the funds be sufficient to satisfy all the claims, the executor, unless he

has given his assent, may maintain an action against the legatee for possession against his will. Nor can the legatee take possession of his bequest without the executor's assent, even though the will of the testator should give authority for that express purpose. Reason good is there that such should be the case; for if the will of a testator could have the effect of appointing his property without the assent of his executor, he might appoint every sixpence of it to specific legatees, and defraud every one of his creditors of their claims. Notwithstanding the extent of his power, however, the executor cannot divest the legatee of his inchoate right, or anticipatory property; and should he die before the distribution of the effects, his representatives would take his share. Yet for the vesting of the legacy, or the delivery of the bequest, the assent of the executor is necessary; and what that assent consists in we will now proceed to show.

NATURE OF THE ASSENT.

The law has prescribed no particular form in which this assent shall be given, and a very slight intimation is held sufficient. Not only may the executor authorize the legatee to take pos-

session of the bequest in direct terms, but indirect expressions, or relative acts, will have the same effect—anything, indeed, from which an intended permission can be construed. Thus, if the executor congratulate the legatee on his legacy, or if a specific legacy be left to any one, and the executor request him to keep or dispose of it, or if he in any way refer a third party to the legatee as proprietor of his legacy, or if he himself treat him, or treat with him as the proprietor. As for instance, where an executor requested the lease of an estate left under a will which he had to administer from a legatee, and accepted the lease which was granted in accordance with his request, it was held that he allowed the granter to be the proprietor of the estate which he had granted. An assent to an estate in remainder is an assent to the present estate, for a remainder can only be a continuation of an estate, and therefore a part of it. Whenever property, however, is so divided, that it has acquired two qualities, as is the case of land under a term for years, where there is the real property, and the chattel real arising out of it—the land and the rent—an assent to the legacy of one quality is no assent to the legacy of the other, and therefore, an assent to the legacy of

the rent is no assent to the legacy of the land; but on the principle that the greater comprises the less, assent to the legacy of the land will carry assent to the legacy of the rent.

ABSOLUTE AND CONDITIONAL ASSENT.

The nature of *absolute* assent is self-evident. It is an assent given to a legacy, without reference to any contingent or dependent circumstance, and when once given cannot be retracted, and the legacy to which it pertains can be affected by nothing but the subsequent discovery of debts, which may cause an abatement of its amount. How that acts will be shown hereafter.

Conditional assent is assent with a reservation, or with an obligation upon the claim of the legatee; so that if the contingency shall occur to which the reservation shall refer, the legacy shall not vest; or if the obligation be not completed it shall lapse. In either case, the condition must be precedent to the assent, or it is no condition at all, and the executor can never afterwards impose it; or, in other words, the assent is absolute. Thus, if a testator leave a leasehold estate to one of his friends, but at the time of his death there happen to be arrear-

ages of rent, without payment of which the property would revert to the lessor, and the executor assent to the legacy, on condition that the arrearages be paid by the legatee. Should the latter pay these arrears, he becomes entitled to the bequest; if not, the legacy would lapse, for there is no assent. This is necessary; for if the executor were to give an absolute assent to the legacy, he would be obliged either to pay the arrears out of the general estate to the loss of the other legatees, or out of his own pocket by their compulsion. If, however, the executor be imprudent enough to assent to the legacy on condition of something being done subsequent to its reception by the legatee, as, for instance, with the proviso that he shall pay the executor a certain sum annually, this in no way affects the assent, and the legatee would take whether he performed his condition or not. In the case of failure the executor could not divest him, but must seek his remedy as he might.

The peculiar position of a fund out of which a legacy is to be paid, though it may be required by the will that it should be given absolutely, may make it necessary for the executor to impose a condition, and he has a right to do so; and he may withhold the legacy if that condi-

tion be not complied with, that is, provided it be reasonable. But if he once part with the legacy, he at the same time divests himself of the power of imposing stipulations, and he will have no right afterwards to make that conditional, which by the terms of the will was made absolute.

It should be observed that the executor's assent to a legacy has reference to the state of the fund at the time of the testator's death, and if through circumstances any alteration should take place in the state of the fund before the payment of the legacy, he has no right to mould his conduct and direct his assent upon that alteration, but he must pass the legacy as he found it, and the legatee will have the right either to accept it with its clogs, or abandon it altogether; and whatever advantage accrues to his inchoate property after the death of the testator, and before his actual acquisition of the legacy, to that the legatee is fully entitled.

When once assent has been given to a legacy, the executor can never afterwards retract; and notwithstanding a subsequent retraction, a legatee of a *specific* bequest has a right to his legacy, and has a lien on the assets, and may follow them for that specific part; and should the exe-

cutor refuse to pay it, he may recover it by action at law. An assent to a void legacy, however, is void; and should an executor by mistake give such assent, the legatee acquires no right thereby.

Assent may be given before the probate is obtained; for an executor's authority arises at the moment of the testator's death; but if he has not attained the age of twenty-one years, he is incapable, by the Act of 38 Geo. III., c. 87, of exercising the functions of his office, and his assent before that time is consequently void.

CHAPTER VI.

PAYMENT OF LEGACIES.

With respect to the *time of paying legacies*, it may be observed that whilst, on the one hand, the assent of an executor is necessary to the title of a legacy, the law has taken care that he shall not be hurried into the performance of his important duty, and be led into errors without due deliberation, and has provided therefore that he shall not be compelled to pay the bequests of his testator before a year has expired from the period of his death. This custom is adopted from the civil law, and it is conceived that during this time he will have opportunity of fully informing himself as to the state of the property and its competency to pay all the calls which either the will of the deceased has imposed in the shape of legacies, or which have arisen from his proceedings in the shape of debts. An executor, therefore, who after the satisfaction of all these leading calls, shall pay over the remainder of the estate, if any, to the residuary legatee, cannot plead that he has *fully* and rightly parted with all the property, in reply to his testator's liability on a covenant

which is only made apparent after that time and within twelve months of his decease. Against the legatees, indeed, who have obtained too much, and before the time, he has a remedy; for it was decided in the case of *Livesey* v. *Livesey*, that where an executor had by mistake made payment of an annuity before the legatee was entitled to receive it, he was entitled to retain the amount of the payments he had made out of the future payments. And if a legacy be paid in instalments, and through inadvertence the executor pay a larger amount in the first instalment than he ought to have done, he may either retain it altogether out of the next, or deduct it equally from each of the subsequent instalments.

THE LEGATEES.

If a testator leave a legacy to an individual "and to the heir of his body," or to a female, "and to be secured to her and to the heirs of her body," or to one "and to her issue," they are *absolute* legacies, the sole and entire property of the party to whom they are left, and those parties are entitled to receive them. Such is the case also where a legacy is left to a female, "when and if she should attain the age of

twenty-one, to her sole and separate use; and in case of her death, having children, her share to go her children," and to her personally, or to any deputy or attorney, as the law phrases it, properly authorized to receive it, must the legacy be paid. But if a legacy be only generally expressed as to be given to a certain individual, and "to her heirs or children," the legatee only takes a *life interest.*

Where legacies are left to each of a certain number of relatives, *or* to their respective child or children, and should any of them die without a child, the share reverting to the residuary legatee, the relatives so named who survived the testator will each take their share absolutely; for the law cannot contemplate so distant an event as the possibility of the legatees having no children all their lives, and therefore passes the property of the bequest to them in full, and thereby destroys any reversionary right of the residuary legatee.

When a legacy is left to an infant, or person under twenty-one years of age, payable on his attaining that age, and he die before the time, his representative, although he will inherit the property, cannot claim it until the period arrives when the party through whom he claims

would have received it. But if the will states that the legacy is to carry interest, the representative can claim it immediately on the death of his principal. Should a legacy be made payable out of *land* at some future time, although it should carry interest in the meantime, it was decided in *Gowler* v. *Standerwick*, that if the legatee should die before the time arrives, the fund should not be raised until that time, securing, nevertheless, a personal fund for a future or contingent legatee. When, however, it was stated by the will that certain legacies should be paid on the land, *but expressed neither* time nor *manner* in which the money should be raised, nor did it appear that the estate was a reversion, which was in fact the case, it was held that the estate should be disposed of in order to raise the legacies, and that they should be paid with interest from the time of the testator's death, and not from the period when the estate would accrue.

Should the will express that a legatee is to take on attaining the age of twenty-one, and in the event of his dying before twenty-one, then that it is to go to another, that other person will take the legacy immediately on the death of the first-named legatee, if he should die before

twenty-one, because he does not claim through the first party, but, in consequence of a direct right which became his on the death of that party. But in the case of *Moore* v. *Godfrey*, where legacies were given to three co-heiresses, to be paid to them on their respective marriages, and in case of the death of any of them before marriage, her or their share to go to the survivor or survivors, and one of the sisters did die unmarried, it was held, that the portion of the deceased did not accrue to her sisters, any more than their original shares, until the period of their marriage, according to the terms of the original devise.

Where stock is left to trustees to pay the dividends from time to time to a married woman for her separate use, the bequest is an unlimited one, and passes the capital as well as its interest, and she may appoint or direct its disposal at her death. And where a certain sum had been left to trustees, in trust, to pay the dividends to a party, until an exchange of certain lands should be made between him and another party, the capital then to be equally divided between them, and the latter died before the time for making the exchange expired, the former party obtained the whole of the legacy.

If a legatee is to receive an estate, including residuary legateeship, on condition of paying the debts of the deceased, and he take the estate, he is liable for the whole of the debts, though they may exceed the value of the estate tenfold.

Conditions may be annexed to legacies, which in some cases become substantive parts of title, but are in others void and useless. Thus, when a legacy was bequeathed, on condition that the legatee "should change the course of life he had too long followed, and give up low company, frequenting public houses, &c.," it was held that it was a condition that ought to be complied with, and the court directed an inquiry to ascertain whether it had been before it would direct the payment of the legacy. But when, on the contrary, a legacy was left to a married woman, on condition that she lived apart from her husband, the legacy was awarded notwithstanding the breach of the conditions, because it was deemed contrary to good morals and Christian duty. When a condition was annexed that the legatee should take, provided he did not marry without the consent of the executor, expressed in writing, and he did marry with the consent of such executor, but expressed verbally and not in writing, it was held that he was entitled to the

legacy; and the consent of a co-executor, who had not acted, was not considered requisite.

A legacy was given on condition that the legatee intimated to the executor his willingness to forgive certain debts, and he filed a bill in Chancery to recover his claims, it was decided that he had forfeited the legacy. In a case where a testator authorized his executors, at any time before a certain person attained the age of twenty-six, to raise £600 by sale of stock, and apply the same towards his advancement in life, or for any purposes for his benefit, as the executors might think proper, and at the age of twenty-six he made an absolute gift of the £600 to that person, the executors declined to act, and the court refused to give any portion of it, until it could ascertain whether the legatee's position was such that he would suffer detriment unless the whole, or a portion, were paid.

TO WHOM LEGACIES SHOULD BE PAID.

No small care is required on the part of executors to pay legacies into the hands of those who are entitled to receive them; for it has not unfrequently happened, that an honest man has been reduced to ruin by the obligation to pay money over again out of his own pocket, in

consequence of mistakes, in regard to those who were entitled to receive portions of the estate of his testator. Nor has it been a very unfrequent circumstance, that legatees have been deprived of their just, and perhaps necessary rights, in consequence of their inability to recover from an executor that which he had wrongly paid to other persons.

Many of these misfortunes have occurred from the misapplication of legacies to infants; and the general rule is now established, that an executor has no right to pay a legacy to the father of an infant, or person under age, or to any other relative of his, without the sanction of a court of equity. Even in the case of an adult child, such payment must be made with the consent of the child, and confirmed by his ratification at an after period. For cases have occurred, where, with the most honest intentions, an executor has paid a legacy to the father of an infant, and has been obliged to pay it over again to the legatee himself on coming of age; and although several of these cases have been attended with gross hardship to the executors, yet the custom is attended with such serious danger to the interests of infants, that the court would never consent to sanction the practice. Nor will

it do so, even though the testator on his death-bed desire it, as was shown in the case of *Dagby* v. *Tolferry*, where the points were extreme. An executor will, however, be justified in paying a portion of a legacy left to an infant, to the infant himself, or to his guardian, if it should appear that the money is absolutely needed for necessaries for such infant. But should a legacy to an infant be too inconsiderable to apply for the authority of the Court of Chancery, the executor would be justified, too, in paying it into the hands of the infant, or its father; but he is not generally warranted in so doing. And if the father institute a suit in a spiritual court, in order to have his infant's legacy paid into his hands, a prohibition against it may be readily obtained by the executor.

Where the circumstances are difficult, and the executor knows not how to act, he may shelter himself under the directions of the statute 36 Geo. III., c. 52, s. 2, by which it is enacted, that "where by reason of the infancy, or absence beyond the seas, of any legatee, the executor cannot pay a legacy chargeable with duty by virtue of that act; that is to say, given by any will or testamentary instrument of any person who shall die after the passing of that act, it

shall be lawful for him to pay such legacy, after deducting the duty chargeable thereon, into the Bank of England, with the privity of the Accountant-general of the Court of Chancery, to be placed to the account of the legatee, for payment of which the Accountant-general shall give his certificate, on production of the certificate of the Commissioners of Stamps, that the duty thereon hath been fully paid; and such payment into the Bank shall be a sufficient discharge for such legacy, which, when paid, shall be laid out by the Accountant-general in the purchase of 3 per cent consolidated annuities, which, with the dividends thereon, shall be transferred or paid to the person entitled thereto, or otherwise applied for his benefit, on aplication to the Court of Chancery, by petition or motion, in a summary way." But, as in all other cases, the executor is not bound to pay the legacy into the Bank until the end of a year from the testator s death.

When personal property is bequeathed for life to one party, with a direction that it shall go to another after his death, the property is retained by the executor, who must invest it in the 3 per cent. consols, until the death of the first legatee, when it must be handed to him. But this

rule does not hold where a testator dies abroad, having made his will out of this country, unless the first inheritors come here, in which case the person in remainder has a right to have it invested.

If an executor obtain a power to divide a sum of money committed to his charge, at his discretion, a court of equity will interfere to control his division, if it be unreasonable; as, where a testator left £1,100 to be divided between his two daughters (one of whom was by a former marriage), at the discretion of their mother, and she gave £1,000 to her own child, and only £100 to the other, her distribution was overruled, and an equal division was made. The misbehaviour, however, of any of the children, will form a sufficient plea for unequal division.

In a case where a testator had left a sum of money to a certain person, but left it to the discretion of the executors out at interest, if they should think such a disposition more to his advantage, with orders to pay him the dividends, and directing the principal to be divided amongst his children at his death, or at the legatee's discretion in default of children, and one of the executors died, and the other renounced the trust, it was held that the legacy was absolute to

the legatee, and it was accordingly paid to him.

Another instance of unexpected contingency occurred in the case of *Birch* v. *Wade,* where the testator willed that one-third of his principal estate and effects should be left entirely at the disposal of his wife, if she should think proper, among his relations, after the death of his sisters; she died without making any disposition, and it was held a trust for her next of kin at the time of her death.

A legacy left to a married woman must be paid to her husband; and even where she was living separated from her husband, without maintenance, and the executor paid her a legacy and took her receipt for it, he was compelled, on suit from the husband, to pay it over again with interest. Nor is the rule altered in a case of divorce, *a mensâ et thoro;* for there the husband alone can release it. But the executor may decline to pay it to him, if it amounts to £200, unless he has made, or will make, a sufficient provision for his wife. And if a woman who is, or has been, married, becomes entitled to a legacy, the court will require a positive affidavit that it has not been in any way

settled, before it will decree payment to her personally.

Money bequeathed to a charity established out of England, must be paid to the persons named by the testator to receive it.

Legacies left to a bankrupt become the property of his assignees, unless his certificate be signed, and even then, unless it has been allowed by the Lord Chancellor; and they must, therefore, under such circumstances, be paid to his assignees.

As the law now stands, all legacies are subject to the debts of the testator, unless there be sufficient assets to pay both debts and legacies; and in the event, therefore, of the estate proving insufficient for the debts, after some or all of the legacies are paid, the executor can compel the legatees to refund altogether, or in proportion to the deficiency.

Under the will of a person residing abroad, or in the colonies, legacies are payable in the currency of the country where the testator resided at the time the will was made. Nor does it affect the case that he has effects in this country as well as there, unless he shall have separated the funds by his will, and charged the

legacies on his English property. When some legacies are described as *sterling*, and others not so, they must be paid accordingly, and in compliance with such description. So also, if a testator bequeath a legacy, either of a single sum of money, or of an annuity charged on lands which are in another country, the full amount shall be paid according to English count, and without any deductions for the expenses of remittance.

DUTY UPON LEGACIES.

The executor is responsible for the duties upon all legacies, and must pay them. He, therefore, pays every legacy specified in the will, short of the amount which he has to deduct for duty; and on its payment he is bound to take a property stamp receipt, according to the value of the legacy and the relationship of the legatee to the testator.

A bond debt forgiven by will is a legacy, and therefore liable to duty. Duty was charged upon a legacy of £50 a-year, to be laid out in bread and divided among the poor of the parish, although some of them only received about two shillings a-year each. But a residue to be divided, in which the several

recipients did not receive more than £15 each, was not chargeable, though had any of the legatees been entitled to more than £20, their share would have been.

Where a legacy is directed to be paid "without deductions" or "free of expense," the executors must pay the amount in full, and discharge the duty from some other fund. Such, also, will hold with regard to annuities as well as sole legacies. An expression, also, of "clear of all outgoings and taxes," with respect to an annuity, will carry the same privilege.

If by the will a legacy be given free of duty, and by the codicil that legacy is revoked, and a larger one given by way of increase, it is equally free from duty as the original legacy. But if an annuity be left in the body of the will, free from all stamps and taxes, with a gift over, which is revoked by the codicil, and a small annuity left, without the gift over, it is held to be altogether a new legacy, and not entitled to exemption from duty.

Where a testator died in India, where his executors also lived, and where all his property was situate, it was held that a legacy remitted to a legatee in England was free from duty. When, however, part of such a testator's pro-

perty was found in England, and a legatee instituted a suit to have his legacy paid out of that portion of the assets, it was liable to the duty. Property belonging to a foreigner, though it be in this country and given to English legatees, is not liable to duty. But American, Austrian, French, and Russian stock, if the property of a person domiciled in this country, is liable to legacy duty. Yet probate duty is not payable upon property situated in a foreign country, though brought into this, and administered by an English executor.

In general it may be observed, that where an executor has inadvertently paid a legacy without deducting the duty, he can compel the legatee to refund, and in one instance, when an annuity had been paid for four years without deducting the duty, until the executor had assigned the whole of his interest, he was deemed to be only the surety of the legatee, and could compel him to return accordingly.

INTEREST ON LEGACIES.

A distinction formerly prevailed as to the quantum of interest payable on legacies charged on lands, and such as were chargeable on personal property, for it was deemed but fair that

as land never produces a profit equal to the interest on money, so the interest on a legacy charged on such property, should be one per cent. lower than that charged on personalty. But the distinction is now set aside, and whether legacies are charged on realty or personal estate, the established practice is to allow only *four per cent.* where no other rate of interest is specified by the will. This custom prevails upon all legacies administered in England whether derived from home, colonial, or foreign property.

When interest is payable upon a legacy, can alone be learned from the will itself. Not that interest will only be paid when the will expressly states that it should be, for the greater number of cases are those in which interest has been paid from inference of the testator's intention as derived from the construction of his expressions. But these are so various, that any attempt to specify the principles on which the construction for interest is based would be futile; a careful attention to the wording of the will generally enables any one of ordinary understanding to ascertain when he may be entitled to interest, when that effect is not plainly expressed. The ordinary rule is, that wherever a legacy is made

payable out of a fund bringing interest at the death of a testator, as a mortgage or money in the funds, the legatee is entitled to the interest his share of that fund produces, until his legacy is paid; and wherever the bequest is made upon property not bringing interest, as when a sum is left to a party to be raised out of houses or land to be sold, the legatee is not entitled to any such benefit.

CHAPTER VII.

THE ADEMPTION, CUMULATION, AND ABATEMENT OF LEGACIES.

No care is too great to give a precise expression to a testator's will, and difficulties enough often arise after every care has been taken to avoid misconstruction, and therefore there cannot be too much care spent in endeavouring to ascertain, as well as to express, the meaning of a testament. But there are frequently other circumstances which supervene to alter, enlarge, or altogether obviate the intentions of a testator for the benefit of his relatives, without possibly any cognizance on his part. In some instances, the legacies which he intended to give are, either by his own voluntary or inadvertent act, or by the influence of circumstances, altogether taken away and lost to the parties whom he nominates legatees; and this is called the *ademption* of legacies. In other cases, the amounts of the legacies specified become, through the effect of other circumstances, increased, and this is called the *cumulation* of legacies. In others, again the amounts, instead

of being increased or destroyed, are decreased; and this is called the *abatement* of legacies.

THE ADEMPTION OF LEGACIES.

This ademption may be either express or implied; for the testator may not only in express terms revoke a legacy which he had previously given, but his intention to do so may be indicated by particular acts. Thus, where a father gives to one of his children, a daughter, a legacy of a certain amount, and afterwards gives her that amount, or a larger one, as a marriage portion; or if a son, gives him the same amount or a larger one, to establish him in business, or to be of benefit to him for life in any other important way,—in both these cases, the legacies are considered to be adeemed or lost to the parties. But this ademption will not be implied, if the bequest is to come out of the residue, nor if the provision given by the father in his lifetime is loaded with any contingency; as repayment, or the performance of any particular covenant, as a consideration for the provision for them; it is in a manner bought by the recipient, and it would be unjust to deprive him or her of a free gift, as a legacy is always construed to be by such a purchase. Neither

is the legacy lost if the converse of this be the case; that is, if the legacy itself, and not the provision, be loaded with a limitation or contingency; for then it is evident that the legacy and the provision are not identical, which they must evidently be for the former to be lost. Nor is it adeemed if the testator be a stranger, or the uncle of the legatee, or if the latter be an illegitimate child, unless the father shall openly have assumed the office and performed the duties of a parent to it. The principle of *identity* appears to be the governing rule; for as the law does not allow the other legatees to be defrauded by a sum being paid to a party under a will, which had been previously paid by the act of the testator himself, so it must have clear evidence that the testator intended the gift to supersede the legacy, before it will suffer the legatee to be deprived of his right, simply because he appears to have enjoyed more favour at the hands of the testator than was at first supposed. Ademption, therefore, may always be resisted by evidence.

But a legacy is evidently adeemed when there is a decided impossibility of paying it; as when the whole of the testator's assets have been swallowed up by his debts, which always

precede legacies in their right. When the object itself is lost which is made the subject of a legacy, the latter is of course adeemed, as when a man leaves a particular estate as a specific legacy without stating its value, and he disposes of that estate before his death. Or if he leave the furniture of a particular house, and he leave that house, and sell the furniture before his death. But the removal of the whole of the furniture to another house would be only an implied ademption, and might be resisted by evidence of the testator's intention to give that particular furniture, wherever it might be, to the legatee. The bequest of a debt to a debtor, of which debt the testator compels payment after making his will, would be an ademption of the legacy; but the voluntary payment of the debt before the death of the testator, would not, in all probability, deprive the legatee of the amount which he had paid; the ademption would then depend there, as it does, indeed, in all cases, upon the intention of the testator, where circumstances do not offer an insuperable bar to the fulfilment, such as we have stated above. The object, therefore, should be to get that intention ascertained.

THE CUMULATION OF LEGACIES.

Cumulation, like ademption, very often depends upon the intention of the testator, for it may be his desire to increase a legacy, or he may, through inadvertence, state it twice over. For instance, where a specific thing, as an estate, a horse, or a house, is stated twice over, there is clearly no cumulation. When a like quantity is bequeathed to the same legatee twice in the same instrument—as the will, or stated in the will, and repeated in the codicil, unless the word, "another," or something equivalent to it, be annexed. So, also, a subsequent statement of a certain sum, as an unconditional legacy, when it had been previously stated as a conditional one, is no cumulation. When, however, two unequal quantities are stated for the same legatee, though they be in the same instrument, they are two legacies, and not one. Such is the case, also, when two equal sums are given by different instruments ; and when both legacies are expressed as being given for the same cause, they are not cumulative ; it is too apparently an inadvertence. But when two different reasons are assigned they are two legacies ; or when the legacies are of different natures,

though of the same amount, as one a sum of money, and the other an annuity, or two annuities of similar amount, but differently paid, as one half-yearly, and the other quarterly, or similarly paid, but out of different estates, as one out of real, and the other out of personal, estate.

Extrinsic circumstances will also cumulate legacies, though stated of the same amount; as, when after the date of the will, but before the date of the codicil, the testator has received an increase of fortune, for it is then evident that he intended to dispose of the accession. Indeed other, very slight, circumstances are often admitted as evidences of cumulation.

LEGACIES IN SATISFACTION OF DEBT.

Sometimes it happens that legacies, instead of being purely such, are mere satisfactions of debt; and on this point, as on the two preceding, the intention of the testator is the guide of judgment. In general, the legacy of a debtor to his creditor, when the bequest is equal in amount to the debt, or greater, is considered as a payment of the obligation. But many circumstances may occur to obviate this construction, as if the legacy be left conditionally; for a

man has no right to take an uncertain advantage as a recompense for a certain claim. Nor when the advantage is postponed whilst the claim is present; as when the legacy is to be paid at a future period, while the debt is due immediately on the death of the testator, though the postponement be for ever so short a period. Nor unless the legacy be in every way equal in advantage to the debt. Nor when an express injunction is laid on the executor for the payment of debts. Nor if the debt be contracted after the date of the will, for then the satisfaction of it by the legacy could not have been contemplated. Nor when the amount of the debt is open and uncertain, as when there has been a running account between the testator and legatee, which is unclosed at the death of the former, for then he could not positively know of the debt.

In this instance, however, as in others, the law is favourable in its construction of kindly intentions, and parol evidence is accordingly admissible to refute the construction unfavourable to the legatee's interests. But, just as well as considerate, it decrees that a legacy shall be considered as satisfaction of a debt in all cases where there is a deficiency of assets.

On the contrary part, in order to secure the interests of both parties, it is held that a legacy left to a debtor is to be considered as a complete or partial satisfaction of his claim, for he is conceived to have goods in hand for the payment of so much of the amount of his debt. Through the influence of the same principle, money or goods delivered or lent to a legatee, are considered as a *pro tanto* payment of his claim. Should the debt itself be bequeathed, it is a pure legacy, if there are sufficient assets to satisfy all the other debts; but if not, then this debt is considered as part of the assets, and the legatee would share the benefit in proportion.

ABATEMENT AND REFUNDING OF LEGACIES.

In the event of there not being sufficient assets to satisfy the debts of the testator, all the legacies under his will are subject to abatement or reduction to pay the creditors; but in the event of there being sufficient to satisfy the debts and specific legacies, by adeeming the several legacies, they are adeemed or abated in proportion; and should the executor have paid certain of the legacies, or even all of them, and afterwards find debts which he was bound to satisfy, he can compel the legatees to refund in proportion

to the amount of their bequests, until the claims are all paid. It is usual to take an agreement to refund if necessary; but whether this is done or not, the power of the executor remains as long as the claims of the creditors can be enforced.

CHAPTER VIII.

LEGACIES TO EXECUTORS,—AND LEGATEES' REMEDIES AGAINST THEM.

If a legacy be left to the executor, and he take possession of it generally, he will hold it under his official capacity; and his union of the double character of executor and legatee makes no difference, and his legacy is subject to all the caution and consequences which are required and wait upon other legacies—the same cumulation, abatement, and ademption. He only has a right to secure himself first of the several legatees. Assent is as necessary to his legacy as to others; and it may be given either expressly or by implication; and he is subject to the same liability and conditions. But yet he is entitled to the full distinction between the character of executor and legatee; and if he enter upon an estate as the former, it does not inculpate him in liabilities until he shall have assumed them as the latter.

If a testator appoint his debtor to be his executor, the appointment formally releases and destroys the debt, unless the executor renounces the trust; and he is safe against all but creditors

of the estate, for the bequest of a debt to an executor is always considered as a specific bequest.

Should, however, this bequest be contradicted, as regards the legatees, by the express terms of the will, or by strong inference, as where the testator leaves a legacy, and directs it expressly to be paid out of the debt due to him by the executor. In like manner, also, if he leave the executor a legacy, it is evident that it is not to be cumulated by the debt also. So, where a testator bequeathed large legacies, as well as the residue of his estate, to his executors, one of whom was indebted to him to the amount of £3,000, under bond, it was held that the whole of the remainder, as it stood, should be equally divided between them; that is, he that was not indebted became a creditor, to a certain amount above him who had hitherto been a debtor to the estate.

An executor has a still further right, when he is not named as expressly an executor in trust, and there is no appointment of the residue of the estate, after all the debts and legacies are satisfied, he, in right of his office, becomes residuary legatee; but, if either, by inference, expression, or legacy, he is debarred from that

advantage, he becomes tenant in trust for the next of kin, and among these he must divide the amount of the testator's property.

LEGATEES' REMEDY AGAINST THE EXECUTOR.

Though an executor hold no personal property in the estate of his testator, he is responsible for the right care and custody of the property under his charge, while for whatever mischief may arise from the misapplication and injury of it before distribution, without any fault of his wilfully committed, he can shelter himself under the estate. All costs, consequently, which are incurred in following the testator's instruction, or in the right appropriation of the estate, are to be paid out of that estate. But for all wilful negligence, or improper conduct, he is answerable to the legatees, both at common law and in equity, and is liable to pay the cost out of his own estate.

Appended is the list of duties payable upon legacies, and the amount of which the executor is entitled to deduct before he pays the amount of each legacy.

Rates of Duty, payable on Legacies, Annuities, Residues, &c., of the Amount or Value of £20 and upwards, by Stat. 55 Geo. III. cap. 184.

The Description of the Legatee, Residuary Legatee, or next of Kin, *must be in the following Words of the Act.*	Out of Personal Estate only, if the Deceased died any time *before* or upon the 5th April, 1805.	Out of Real or Personal Estate, if the Deceased died *after* the 5th April, 1805.
To Children of the Deceased, and their Descendants, or to the Father or Mother or any Lineal Ancestor of the Deceased	(no Legacy Duty)	£1. per Cent.
To Brothers and Sisters of the Deceased, and their Descendants	£2. 10*s*. per Cent.	£3. do.
To Brothers and Sisters of the Father or Mother of the Deceased, and their Descendants	£4. — do.	£5. do.
To Brothers and Sisters of a Grandfather or Grandmother of the Deceased, and their Descendants	£5. — do.	£6. do.
To any Person in any other Degree of Collateral Consanguinity, or to Strangers in Blood to the Deceased	£8. — do.	£10. do.

Where any Legatee *shall take Two* or more distinct Legacies or Benefits under any Will or Testamentary Instrument, which shall together be of the Amount or Value of £20. each shall be charged with Duty, although each or either may be separately under that Amount or Value.

☞ OBSERVE.—*The Duty on Annuities is payable by four Annual Instalments in the first four years from the commencement of the Annuity, and a penalty will be incurred if each of the succeeding Instalments of Duty be not paid in due time.*

Should the Annuitant die before the four years have expired, the date of his or her death must be communicated in writing to the Comptroller of the Legacy Duties.

The Husband or Wife of the Deceased is not chargeable with Duty.

PENALTIES.

The Receipt must be dated on the Day of signing, and the Duty paid *within* 21 *Days after*, under a Penalty of £10 per Cent. on the amount of the *Duty*; and if the Duty be not paid within *Three Months* from the Date of the Receipt, a Penalty will be incurred of £10 per Cent. on the *amount or value of the Legacy*:—and the Commissioners of Stamps cannot, *under any circumstances*, Stamp a Receipt on which the Duty shall not be paid within the time limited, unless the Penalty be also paid.

NOTE.—Rents, Interests, or Dividends of Legacies, down to the Date of the Receipt, must be added to the Legacy, and Duty paid thereon

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